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Harold J. Berman

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# THE RELIGIOUS FOUNDATIONS OF WESTERN LAW†

*Harold J. Berman\**

## I. THE WESTERN LEGAL TRADITION

The Western legal tradition, like Western civilization as a whole, is undergoing in the 20th century a crisis greater than any other in its history, since it is a crisis generated not only from within Western experience but also from without. From within, social, economic, and political transformations of unprecedented magnitude have put a tremendous strain upon traditional legal institutions and legal values in virtually all countries of the West. Yet there have been other periods of revolutionary upheaval in previous centuries, and we have somehow survived them. What is new is the confrontation with non-Western civilizations and non-Western philosophies. In the past, Western man has confidently carried his law with him throughout the world. The world today, however, is more suspicious than ever before of Western "legalism." Eastern man and Southern man offer other alternatives. The West itself has come to doubt the universal validity of its vision of law—its validity for non-Western cultures. What used to seem "natural" now seems only "Western," and often it seems obsolete even for the West.

We shall not understand the dimensions of the crisis of the Western legal tradition unless we are willing to view that tradition in large historical perspective. It is said that a drowning man may see his whole life flash before him. Perhaps that is an unconscious, desperate effort to find the resources within himself to escape from his predicament. While this article does not propose to recount the whole life history of the drowning Western legal tradition, it will attempt to recall the circumstances under which it first came into being, in order to identify the foundations on which it rests. It seems that this is a necessary first step in assessing the predicament in which we now find ourselves.

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† This article was delivered as the Tenth Annual Pope John XXIII Lecture on October 25, 1974, at the Catholic University of America Law School. The text remains substantially as delivered.

\* Story Professor of Law, Harvard University. A.B., Dartmouth, 1938; M.A., 1942, LL.B., 1947, Yale.

To speak of historical origins is, of course, risky. Wherever one starts in the past, one can find still earlier beginnings. Nevertheless, I am prepared to argue that the history of law is *not* a "seamless web," there *are* seams; there are new things under the sun, and the starting point is not necessarily arbitrary. More particularly, it can be shown that there was a time—less than 900 years ago—when what we know today as *legal systems* did not exist among the peoples who lived in what we today call Europe; and that in the late 11th, 12th, and 13th centuries legal systems were created first within the Roman Catholic Church and then within the various kingdoms of the West which shared power with the Church.

By the term "legal systems," I mean something narrower and more specific than a "legal order." There was, of course, a legal order in every society of the West prior to the late 11th and 12th centuries, in the sense that there were legally constituted authorities which applied law. Indeed, we know of no time in the history of the peoples of Europe when there was not a legal order in that sense: the earliest written records of their history are collections of laws, and Tacitus, writing in the 1st-2nd century A.D., describes Germanic assemblies acting as courts. In addition, the Church from very early times had declared laws and had established procedures for deciding cases.<sup>1</sup> Nevertheless, the legal rules and procedures which were applied in the various legal orders of Europe, both secular and ecclesiastical, in the period after the decline of the Roman Empire and prior to the late 11th and 12th centuries, were largely undifferentiated from social custom and from political and religious institutions generally. No one had attempted to organize the prevailing laws and legal institutions into a distinct structure. Very little of the law was in writing. There was no professional judiciary, no professional class of lawyers, no professional legal literature. Law was not consciously systematized. There was no independent, integrated body of legal principles and procedures clearly differentiated from other processes of social organization and consciously articulated by a corps of persons specially trained for that task.

Then about the year 1100, for reasons which I shall try to explain, the first modern law school was founded in the town of Bologna in Northern Italy. Students came from all over Europe—thousands of them each year—to study law as a distinct and coherent body of knowledge, a science, separate from politics and separate from religion.

Law was studied—but what law? Not, at first, the unstructured, unsystematic customary laws and legal institutions of the Germanic tribes and king-

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1. For a useful short treatment of the history of Church law prior to the 11th century, see R. MORTIMER, *WESTERN CANON LAW* 1-37 (1953).

doms, nor, at first, the unstructured, unsystematic laws of the Church, which were at that time wholly interwoven with theology, liturgy, rhetoric, and morals. Curious as it may sound to modern ears, the law that was first taught and studied at Bologna, and later at the other universities that sprang up throughout the West, was the law contained in an ancient manuscript which had come to light in a library in the Italian town of Pisa near the end of the 11th century. The manuscript contained the enormous collection of legal materials which had been compiled under the Roman Emperor Justinian in Constantinople in about 534 A.D., almost six centuries earlier.<sup>2</sup>

Roman law had, of course, at one time prevailed in the Western Roman Empire as well as the Eastern. In 476, however, the last of the Western Emperors was deposed; and even before then, Roman civilization had been superseded in the West by the primitive, tribal civilization of the Goths, the Vandals, the Franks, the Saxons, and other Germanic peoples. Between the 6th and 10th centuries, Roman law barely survived in the West, although it continued to flourish in the Eastern Empire. Vestiges of it remained in the tradition of the Western Church and of Western rulers, and some of its rules and concepts survived in the customary law of the peoples of (what we call today) France and Italy; but generally speaking, Roman law as such had no practical validity in Western Europe when Justinian's work was rediscovered in Italy, and the memory of it had only recently been revived.

Thus it was the body of law, the legal system, of a remote civilization, as recorded in a large set of books, that formed the object of Europe's first systematic legal studies. That earlier law was venerated as an ideal law, a body of legal ideas, taken as a perfect system; current legal problems, previously unclassified and inchoate, eventually came to be analyzed in its terms and judged by its standards.

The conception of legal science, of law as a body of knowledge found in authoritative books, is a major and indispensable part of Western law, that is, of the Western legal tradition, which encompasses diverse legal orders and diverse legal systems. A second major ingredient is the method of analysis which was applied to the ancient texts, a method which in modern times has

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2. The manuscript consisted of four parts: (1) the Code (*Codex*), comprising twelve books of ordinances and decisions of the Roman Emperors before Justinian, (2) the Novels (*Novellae*), containing the laws promulgated by Emperor Justinian himself, (3) the Institutes (*Institutiones*), a short textbook designed as an introduction for beginning law students, and (4) the Digest (*Digestum*), whose fifty books contained a multitude of extracts from the opinions of Roman jurists on a wide variety of legal questions. In a modern English translation, the Code takes up 1,034 pages, the Novels 562 pages, the Institutes 173 pages, and the Digest 2,734 pages. *THE CIVIL LAW* (S. Scott ed. 1932).

been called, somewhat disparagingly, "scholasticism."<sup>3</sup> At Bologna the scholastic method was applied in law—as it was then applied in theology—to analyze and synthesize authoritative texts, to identify contradictions and reconcile them by applying criteria for judging which doctrines were of universal validity and which were of only relative validity. In law as in theology, the written text as a whole—the "body of civil law" (*corpus juris civilis*), as it then came to be called—was accepted as a sacred embodiment of human reason, but the techniques of reconciliation of contradictions gave the medieval jurists considerable freedom to limit or expand the scope of the concepts and rules laid down in the text. For example, they were able to establish general criteria by which to test the validity of a rule of customary law, such as the duration of the custom, its universality, its reasonableness, etc. The significance of this is apparent when one considers that until the 12th century most law in Europe was customary law. Most legal rules were binding not because they had been promulgated by political or ecclesiastical authorities, but because they were customs practiced by the political or ecclesiastical community. Now for the first time custom lost its sanctity. A custom might be binding or it might not.

The scholastic method also led to the construction of legal systems out of the preexisting diverse and contradictory customs and laws. The techniques of harmonizing contradictions—expressed in the title of the first systematic legal treatise ever produced in the West, Gratian's *Concordance of Discordant Canons*, written in about the year 1140—coupled with the belief in an ideal "body of law," made it possible to begin to synthesize first canon law (*corpus juris canonici*) and ultimately royal and feudal law as well.

A third major ingredient of the Western legal tradition is the context in which the scholastic method was applied to the books of Roman law, namely, the context of the university. The universities of Europe, which were founded in the 12th century and thereafter, brought together legal scholars—teachers and students—from many countries;<sup>4</sup> brought them in contact not

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3. This method, developed in the early 1100's in theology and law, presupposes the absolute authority of certain books, which are to be comprehended as containing an integrated and complete body of doctrine. Paradoxically, however, it also presupposes that there may be both gaps and contradictions within the text. Its primary task is the summation of the text, the closing of gaps within it, and the resolution of the contradictions. The method is dialectical, in that it seeks reconciliation of opposites. See Le Bras, *Canon Law*, in *THE LEGACY OF THE MIDDLE AGES* 321, 325-26 (C. Crump & E. Jacob ed. 1926).

4. For three hundred years, from 1050 to 1350, and above all in the century between 1070 and 1170, the whole of educated Western Europe formed a single undifferentiated cultural unit. In the lands between Edinburgh and Palermo, Mainz or Lund and Toledo, a man of any city or village might go for education to any school, and become a prelate or an official in any church, court or uni-

only with each other but also with teachers and students of other disciplines, which were now for the first time also identified as separate branches of scholarship, namely, theology, philosophy, and medicine, and made of them a guild or, as we would say today, a profession. Thus the European universities gave to the study of law both a transnational character and a professional character, distinct from theology and philosophy, and this in turn helped to give the law itself a transnational and distinctive vocabulary and method. The graduates of the university law schools went back to their own countries, or moved to other countries, where they served as ecclesiastical or lay judges, practicing lawyers, legal advisers to ecclesiastical, royal, and city authorities and to lords of manors, and administrative officials of various kinds in both Church and State. To the extent that they were involved in canon law, they could use their university training directly, since canon law came to be taught in the universities alongside Roman law; to the extent that they were concerned with secular law, they applied to it the vocabulary and the method of the Roman and canon law which they had studied.

The fact that law was taught as a university discipline, the fact that it was considered to be transnational in character, and indeed a branch of universal knowledge, made it inevitable that legal doctrines would be criticized and evaluated in the light of general truths, and not merely studied as a craft or technique. Even apart from the university, the Church had long taught that there is a natural law and a moral law by which all human law was to be tested and judged; but the university jurists added the concept of an ideal human law, the Roman law of Justinian's books, which—together with the Bible, the writings of the Church fathers, the decrees of Church councils and popes, the writings of Aristotle, and other sacred texts—provided basic legal principles and standards for criticizing and evaluating legal rules and institutions. These inspired writings of the past, and not what any lawgiver might say or do, provided the ultimate criteria of legality.

Thus far the discussion has centered on what might be called generally the "style" of the Western legal tradition during its formative era. Let me turn

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versity (when there existed) from north to south, from east to west. . . . In this period a high proportion of the most celebrated writers, thinkers, and administrators gained greatest fame and accomplished the most significant part of their life's work far from the land of their birth and boyhood. Moreover, [in their writing] there is not a single characteristic of language, style or thought to tell us whence they sprang. . . . [O]n the level of literature and thought there was one stock of words, forms, and thoughts from which all drew and in which all shared on an equality. If we possessed the written works without their authors' names we should not be able to assign them to any country or people.

D. KNOWLES, *THE EVOLUTION OF MEDIEVAL THOUGHT* 80-81 (1962).

for a moment to the historic events which produced that style at that time, for thereby we shall understand better what might be called the "content" of the tradition.

The rediscovery of the lawbooks of Justinian at the end of the 11th century was not an accident. They had been diligently searched for in the libraries of Italy by supporters of the papacy in its struggle for the independence of the Church from secular authority, and possibly also by supporters of the emperor in his resistance to the papal party. For each side believed that Roman law would support its claims to supremacy.

Moreover, the systematic study of Roman law which was undertaken after the books of Justinian were rediscovered, and the consequent construction of a new legal science and of new bodies of ecclesiastical and secular law, were a response to the new situation which came into existence during and after that struggle between the ecclesiastical and the secular powers. Historians have traditionally referred to this period by the rather tame title, "The Investiture Contest;" however, it is coming more and more to be recognized as a genuine revolution in the modern sense, the Papal Revolution, which established the modern form of the Western Church and its relation to the secular authority.<sup>5</sup> The essence of that revolution was that it established the Church as a visible, corporate, legal structure, standing opposite the visible, corporate, legal structures of the secular authorities. Therefore, each side, the ecclesiastical and the secular, needed its own system of law to maintain its own internal cohesion and both sides needed a common legal tradition to maintain the balance between them.

With our modern ideas of the separateness of ecclesiastical and secular institutions—ideas which date precisely from the period of the Papal Revolution—it is hard to realize that prior to the latter part of the 11th century the Church was conceived not as a separate institution at all but rather as the whole Christian people, *populus Christianus*, governed both by secular and priestly rulers (*regnum* and *sacerdotium*). Moreover, the *regnum* controlled the *sacerdotium*. Charlemagne himself in 794, six years before he consented to be crowned emperor by the pope, called a Church council at Frankfurt at which he promulgated important changes in theological doctrine and ecclesiastical law. Some historians argue that Pope Leo III made

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5. The view that the *Dictatus* of Pope Gregory VII and the Investiture Contest constituted a fundamental break in the historical continuity of the Church, and was the first of the Great Revolutions of Western history, was pioneered by Eugen Rosenstock-Huessy. E. ROSENSTOCK-HUESSY, *DIE EUROPÄISCHEN REVOLUTIONEN* (1932). See also E. ROSENSTOCK-HUESSY, *OUT OF REVOLUTION: THE AUTOBIOGRAPHY OF WESTERN MAN* (1938); E. ROSENSTOCK-HUESSY, *THE DRIVING POWER OF WESTERN CIVILIZATION: THE CHRISTIAN REVOLUTION OF THE MIDDLE AGES* (1949).

Charlemagne the emperor, but it is more nearly true to say that Charlemagne made Leo pope; and in 813 Charlemagne crowned his own son emperor without benefit of any clergy whatever.<sup>6</sup> In fact, later emperors required the pope on his election to swear an oath of loyalty to the emperor. Of the twenty-five popes who held office in the century prior to 1059 (when a Church synod for the first time prohibited lay investiture, that is, appointment of priests), twelve were directly appointed by emperors and five were dismissed by emperors. Moreover, it was not only the German emperors who controlled bishops within their domain. The other rulers of Western Christendom did the same. In 1067 William the Conqueror issued a decree asserting that the king has the power to determine whether or not a pope should be acknowledged by the Church in Normandy and England, that the king makes ecclesiastical law through Church synods convened by him, and that the king has a veto power over ecclesiastical penalties imposed on his barons and officials.

Even more significant than imperial control over the papacy was the dispersal of authority within the Church among bishops and priests, each of whom was appointed by his respective king or feudal lord. The bishop of Rome was only first among equals. His permission was not generally required for appointment of other bishops or priests, nor was he empowered by canon law to annul decisions taken by them.

In 1075, however, Pope Gregory VII, in his famous *Dictatus Papae* (Dictates of the Pope), proclaimed the legal supremacy of the pope over all Christians and the legal supremacy of the Church, under the pope, over all secular rulers.<sup>7</sup> Popes, he said, could depose emperors—and he proceeded to depose Emperor Henry IV. Moreover, Gregory proclaimed that all bishops and other clergy were to be appointed by the pope and were to be subordinate ultimately to him and not to secular authorities. Thus, the independence of the Church also meant the centralization of authority within the Church.

How was the papacy to make good its claims? How was it to exercise the universal jurisdiction it asserted? One important part of the answers to these questions lay in the potential role of law as a source of authority and as a means of control.<sup>8</sup> In his *Dictatus* Pope Gregory declared that the

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6. See F. GANSHOF, *THE IMPERIAL CORONATION OF CHARLEMAGNE* (1971).

7. Cf. Congar, *The Historical Development of Authority in the Church: Points for Christian Reflection*, in *PROBLEMS OF AUTHORITY: AN ANGLO-FRENCH SYMPOSIUM* 119, 139 (J. Todd ed. 1962) ("One is actually obeying God when one obeys his representative.")

8. Gregory purported to find legal authority, in the modern sense, for every one of the revolutionary provisions in the Dictates. See A. FLICHE, *LA REFORME GREGORIENNE* (1933).



bishop of Rome alone has the power to make new laws, and that the most important cases of every church may be appealed to the papal curia. Indeed, the use of the phrase "papal curia" to refer specifically to a court of law, rather than to the entire papal household, dates from this time.

Many of the rulers of Europe, and many of the bishops and other clergy, refused to accept the Papal Revolution; civil war raged in Europe for forty-five years, from 1077 to 1122, before the "contest" was resolved—by compromise. Separate but equal jurisdictions were carved out for the secular and spiritual realms. In England the matter was not settled until almost fifty years later when Thomas à Becket suffered martyrdom at the hands of Henry II in order to prevent a return to royal supremacy over the Church.

In the century after the end of the Investiture Contest the Western Church, under the papacy, elaborated a new system of law, the modern canon law. As already indicated,<sup>9</sup> ecclesiastical law had previously consisted as much of theological doctrines and liturgy as of law in the technical sense. Occasionally, collections had been made of "canons" derived from sacred writings, decisions of Church councils and of leading bishops, laws of Christian emperors and kings concerning the Church, Penitentials describing various sins and the penalties to be attached to them, and various other writings. These collections were usually arranged chronologically or under a very loose classification of topics, and none of them had more than regional significance. But after the Papal Revolution something new was created: a *system* of canon law, distinct from liturgy, distinct from rhetoric and morals, a system which utilized the newly rediscovered Roman law for much of its vocabulary and legal doctrine and the newly invented scholastic method for its technique of harmonizing contradictory texts into a whole body.

In addition, this new legal system, binding throughout Western Christendom, was conceived as a dynamic system, developing in time. More specifically, the newly proclaimed power of the pope to make new laws—to legislate—introduced into Western law for the first time the concept that law may be, and must be, continually replenished, continually renewed. Prior to the 12th century, legislation, whether by popes or kings, was a rare thing, and was usually disguised as the reaffirmation of older custom. This now changed, first in the Church and then in the kingdoms of Europe. The first four Lateran Councils from 1123 to 1215 issued hundreds of new laws, and in addition the popes issued their own laws in the form of decretals; more than 700 decretals remain from the 22-year reign of Pope Alexander III (1159-81), and five major systematic collections of decretals were prepared

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9. See p. 491-92 *supra*.

during the 27-year reign of Pope Innocent III (1189-1216).<sup>10</sup> In 1234 there appeared the first official collection of canons and decretals, summarizing and systematizing the work of almost a century; it remained the basic law of the Roman Catholic Church until 1917.

Thus, the canon law of the late Middle Ages, which only today, eight centuries after its creation, is being called into question by some leading Roman Catholics themselves, was the first modern legal system. It prevailed in every country of the West, from England and Spain to Hungary and Poland. It governed virtually all aspects of the lives of the Church's own spiritual army of priests and monks and also a great many aspects of the lives of the laity. The new hierarchy of Church courts had exclusive jurisdiction over laymen in matters of family law, inheritance, and various types of spiritual crimes, and it also had concurrent jurisdiction with secular courts over contracts (whenever the parties made a "pledge of faith"), over ecclesiastical property (and the Church owned one-fourth to one-third of the land of Europe), and over many other matters.<sup>11</sup>

At the same time, it was presupposed by the very existence of the modern canon law, and by the Papal Revolution which gave birth to it, that there were other matters, secular in nature, which were to be governed solely by the secular authorities. Partly in emulation of the canon law, and partly in resistance to it, emperors, kings, great feudal lords, and city and borough authorities created diverse bodies of secular law, diverse professional courts, and diverse types of professional legal literature. Thus the tribal, local, and feudal customs which had prevailed throughout Europe until the 11th and 12th centuries, were transformed into new secular legal systems governing breaches of the king's peace, property relations, mercantile transactions, and other matters not specifically involving faith or sin. The growth of secular law at this time was greatly stimulated by the rapid growth of commerce in the 12th century and the concomitant rise of urban centers.

Yet the relationship between the canon law of the Church and the secular law of the kingdoms of Europe could not be one of mere coexistence, or of mere emulation of, or rivalry with, the ecclesiastical law by the secular. There was also a claim of moral superiority by the ecclesiastical authority, coupled with demands for changes in the secular law to conform to moral standards set by the clergy. This was inevitable at a time when the clergy constituted the overwhelming majority of educated persons and hence occupied high positions in the courts of kings and barons. Beyond that, how-

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10. See R. BENSON, *THE BISHOP-ELECT—A STUDY IN MEDIEVAL ECCLESIASTICAL OFFICE* 12 (1968).

11. See generally Le Bras, *supra* note 3, at 321-61.

ever, the very division of ecclesiastical and secular law presupposed a Church Militant which was determined not only to reform the world but also to protect its own cohesion and its own power. Many of the reforms which it promoted command respect even seven and eight centuries later: the introduction of rational trial procedures to replace magical mechanical modes of proof by ordeals of fire and water, by battles of champions, and by ritual oaths; the insistence upon consent as the foundation of marriage and upon wrongful intent as the basis of crime; the development of equity to protect the poor and helpless against the rich and powerful and to enforce relations of trust and confidence—to give just a few examples. On the other hand, religious sanctity was often attributed to legal standards which were of only temporal value. Universal celibacy of the priesthood, for example, made a legal requirement in the 11th century, was valuable as a means of insulating the clergy from clan and feudal politics, but it was given the stamp of a divine imperative which made it survive long after it had ceased to be necessary. The law of heresy is an even stronger example of the danger of attaching religious sanctity to legal standards. Here the Church professed its own unwillingness to shed blood but turned the heretic over to the secular arm to be burned at the stake. Likewise, the penalty of excommunication for disobedience to ecclesiastical authority was—and is—a punishment which can not be justified if the Church is conceived primarily as a legal and political entity rather than as a spiritual community; yet it is a punishment which purports to remove the sinner from the body of Christ.

I have sketched some of the main elements of the Western legal tradition during its formative era in the Catholic Middle Ages. However, substantial changes have taken place in Western law during the four and one-half centuries since the Protestant Reformation. The dualism of church and state has taken many new forms. Ecclesiastical jurisdiction has been greatly restricted, and much of the medieval canon law has been secularized and has passed over—often unnoticed—into the law of the state. Ultimately, Christianity itself has given birth to new secular religions of democracy and socialism, which have in turn threatened to deprive Christianity altogether of its public character, its political and legal dimension; many of the functions of the medieval Church are now performed by the press, political organizations, educational institutions, and the like. Yet despite these and other changes, the Western legal tradition still bears the marks of its origins. It still stands for the autonomy of law, the autonomy of legal science, the autonomy of legal institutions, the autonomy of the legal profession. It still stands for the coexistence within the tradition of diverse legal systems, each of which challenges the other and each of which is to be judged by reason and morality. The law schools of the West remain one of the last bastions

of the scholastic method, by which legal principles of general validity are marked off from those that are variable according to time and place and circumstance. They still teach, at least by implication, that the "body of law," the *corpus juris*, grows organically over generations and centuries, being continually replenished and renewed by legislation and by reinterpretation. The Western legal tradition still stands for the belief that so long as law remains autonomous, so long as it conforms to reason and morality, so long as it develops and grows to meet new challenges, it will continue to be able to resolve individual and social conflicts and to maintain order and justice.

Despite this enormous self-confidence, however, the fact is that the Western legal tradition is *not* able to resolve satisfactorily most of the individual and social conflicts which have confronted it in the 20th century, and is *not* able to maintain order and justice either within the nations that uphold it or in their relations with each other or in the world as a whole. And that is its crisis.

## II. FOUNDATIONS OF THE WESTERN LEGAL TRADITION

The primary cause of the crisis of the Western legal tradition is, I believe, the disintegration of its religious foundations.

By its religious foundations I do not mean Catholic theology or philosophy of the 11th and 12th centuries and thereafter, or the idea of the dualism of secular and spiritual authorities, or the separation of politics and religion. I do not mean the sources of Western law in canon law or the belief that law must be judged by higher standards of faith and morals. These are an integral part of the structure of the Western legal tradition—they are part of what is in crisis—they are not its foundations.

A foundation goes in the opposite direction from the structure which is erected upon it. The *structure* of the Western legal tradition, during its formative era, was its division between secular and spiritual authorities, the one chiefly responsible for order and justice, the other chiefly responsible for faith and morals and the consequent proliferation of diverse autonomous bodies of law as a means of maintaining the jurisdiction of each and the equilibrium between the two. The *foundation* of that structure was an entirely different concept and an entirely different experience, namely, the integration of law with religion, of order and justice with faith and morals, in an integrated community which transcended both.

The foundation was laid in the era prior to the Papal Revolution of the 11th and 12th centuries, when law was not an autonomous body of rules and concepts found in books and cultivated by a corps of professional jurists but rather an integral part of the common consciousness and common conscience

of the various European peoples. In this earlier period from the 6th to the 11th centuries every tribe had its own law: the Franks, Alemanns, Visigoths, Ostrogoths, Lombards, Burgundians, and other peoples who were eventually combined in the Frankish Empire, embracing much of what later became Germany, France, and northern Italy; the Angles, Saxons, Jutes, Celts, Britons, and other peoples of what later became England; the Norsemen of Scandinavia and later of Normandy, Sicily, and elsewhere; and many, many others, from Picts and Scots to Hungarians and Slavs.<sup>12</sup> The legal orders of all these peoples (whom, for the sake of simplicity, I will call the Germanic people, since most, but not all, were Germanic, although they were certainly not German in the modern sense), though largely independent of each other were nevertheless remarkably similar. On the one hand, the basic legal unit within the tribe was the household, a community of comradeship and trust based partly on kinship and partly on oaths of mutual protection and service. Violation of the peace of the household by an outsider would lead to retaliation in the form of blood-feud or else to interhousehold or interclan negotiations designed to forestall or compose blood-feud. On the other hand, there were also territorial legal units consisting typically of households grouped in villages, villages grouped in larger units often called hundreds and counties, and hundreds and counties grouped in dukedoms or kingdoms. In the local territorial communities, the chief instrument of government and law was the public assembly ("moot," or "thing") of household elders. Together with kinship and local territorial communities, there were also various kinds of lordship—in that sense, feudal—bonds, often formed by households "commending" themselves to great men for protection.<sup>13</sup>

At the head of the tribes and of the local and feudal communities there stood royal and ecclesiastical authorities. In the course of time, these became more and more important. Nevertheless, in the period prior to the latter part of the 11th century, royal and ecclesiastical authorities did not attempt to alter in any fundamental way the essentially tribal and local and feudal character of the legal orders of Europe. This may seem less strange if it is added that the economy of Europe at that time was also almost wholly local, consisting chiefly of agriculture and cattle-keeping, with subsidiary hunting; population was sparse and there were few large towns; commerce played only a small role, and communications in general were extremely rudimentary.

When higher royal and ecclesiastical rulers did assert their authority over law, it was chiefly to guide the custom and the legal consciousness of the

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12. See generally A. DIAMOND, *PRIMITIVE LAW PAST AND PRESENT* (1971).

13. Cf. H. LOYN, *ANGLO-SAXON ENGLAND AND THE NORMAN CONQUEST* 292-314 (1962).

people, not to remake it. The bonds of kinship, of lordship units, and of territorial communities *were* the law. If those bonds were violated, the initial response was, as I have already indicated,<sup>14</sup> to seek vengeance, but vengeance was supposed to give way—and usually did—to negotiation for pecuniary sanctions. This was the famous system of fixed tariffs of monetary composition for various types of injuries which was a predominant feature of the Anglo-Saxon, Frankish, and other legal orders of Germanic Europe,<sup>15</sup> as it is a predominant feature of many contemporary systems of primitive law. Adjudication, whether by ordeals of fire or water or by ritual oaths, or by local assemblies or “moots,” was often a stage in the interfamily or interclan negotiations. The jurisdiction of moots usually depended upon consent of the parties and the moot generally could not compel them to abide by its decision. And so peace, once disrupted, was to be restored ultimately by diplomacy. Beyond the question of right and wrong was the question of reconciliation of the warring factions. Again, these statements can also be made concerning the law of many contemporary primitive societies of Africa, Asia, and South America, and also concerning the law of many ancient civilizations which exist on those continents.

In Germanic law proof was formal and dramatic. Legal rules, being largely unwritten, were often expressed in poetic images, which helped to stamp them on the memory. Common phrases were: “unbidden and unbought, so I with my eyes saw and with my ears heard,” “foulness or fraud,” “house and home,” “right and righteous,” “from hence or thence.” Ritual oaths were elaborate,<sup>16</sup> and were to be sworn “without slip or trip.” The

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14. See p. 501 *supra*.

15. For example, Ethelbert's Laws, promulgated in 600 A.D. and the earliest of the Anglo-Saxon compilations of laws, are remarkable for their extraordinarily detailed schedules of tariffs established for various injuries: so much for the loss of a leg, so much for an eye, so much if the victim is a slave, so much if he is a freeman, so much if he is a priest, and so on. The four front teeth were worth six shillings each, the teeth next to them four, and other teeth one; thumbs, thumb nails, forefingers, middle fingers, ring fingers, little fingers, and their respective fingernails were all distinguished and a separate price, called a *bot*, was set for each. Similar distinctions were made between ears whose hearing is destroyed, ears cut off, ears pierced, and ears lacerated; between bones laid bare, bones damaged, bones broken, skulls broken, shoulders disabled, chins broken, collar bones broken, arms broken, thighs broken, and ribs broken; and between bruises outside the clothing, bruises under the clothing, and bruises which do not show black. See Laws of Ethelbert §§ 34-42, 50-55, 58-60, 65-66, in F. ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* (1963).

16. For example, an oath used in suits affirming title to land reads: “So I hold it as he held it, who held it as saleable, and as I will own it—and never resign it—neither plot nor plough land—nor turf nor toft—nor furrow nor foot length—nor land nor leasow—nor fresh nor marsh—nor rough ground nor room—nor wold nor fold—land nor strand—wood nor water.” F. PALGRAVE, *THE RISE AND PROGRESS OF THE ENGLISH COMMONWEALTH* 135 (1832).

law was contained in a multitude of proverbs. The earliest Irish law was in the form of poetry.

The dramatic and poetic qualities of Germanic law were associated with its substantive plasticity. It would be laid down that something shall be the rule as far as a cock walks, or flies, or a cat springs, or one can reach with a sickle, or that so much land shall be acquired as can be ridden round in a certain time on a horse, or turned over with the plow.<sup>17</sup> Because life was much less compartmentalized than it later became, much more a matter of total involvement, poetic and symbolic speech, which is closely associated with the whole being and with the unconscious, was more appropriate than prosaic and literal language, especially on solemn occasions involving the law.

Some of the symbols and ceremonies of Germanic law still survive in modern times, such as the handclasp as a confirmation of a contract and various rituals of sitting and standing at the installation of officeholders.<sup>18</sup>

From a Western, that is, post-11th century point of view, the Germanic folklaw appears defective because of the absence of law reform movements, sophisticated legal machinery, a strong central lawmaking authority, a strong central judicial authority, a body of law independent of religious beliefs and emotions, or a systematic legal science. But that is only one side of the coin. The other side is the presence of a sense of the wholeness of life, a sense of the interrelatedness of law with all other aspects of life, a sense that legal institutions and legal processes as well as legal norms and legal decisions are all integrated in the harmony of the universe. Law, like art and myth and religion, and like language itself was, for the peoples of Europe in the early stages of their history, not primarily a matter of making and applying rules in order to determine guilt and fix judgment, not an instrument of the separation of people from each other on the basis of a set of principles, but rather a matter of holding people together, a matter of reconciliation. Law was conceived primarily as a mediating process, a mode of communication, rather than primarily as a process of rulemaking and decisionmaking.

In these respects the early folklaw of Europe had much in common with Eastern legal traditions. In the tradition of the Chinese and of other peoples who have lived under the strong influence of Buddhist and Confucian thought, social control was not to be found primarily in the allocation of rights and duties through a system of general norms but rather in the maintaining of right relationships among family members, among families within lordship units, and among families and lordship units within local communities and

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17. See R. HUEBNER, *A HISTORY OF GERMANIC PRIVATE LAW* 10-11 (F. Philbrick transl. 1918).

18. *Id.* at 11-12.

under the emperor. Social harmony was more important than "giving to each his due." Indeed, "each" was not conceived to be a being distinct from his society or from the universe but rather an integral part of a system of social relationships subject to the Principle of Heaven. Therefore, in the ancient civilizations of Asia the intuitive, mystical, the poetic side of life was emphasized, and the intellectual, the analytical, the historical—and hence the legal—was subordinated to it.

This was true also of the peoples of Europe in the period with which we have been concerned, before the great explosion of the late 11th and 12th centuries. The Germanic folk myths, which dominated their thought prior to the introduction of Christianity, and which had a lasting influence upon them, did not make a sharp division between magic and logic or between fate and the rules of criminal law. Nor did Christianity, an Eastern religion, make a sharp division between faith and reason.

The old myths were about warring gods, spirits in rivers, woods, and mountains, the divine descent of tribal kings, and similar matters; they were based on an overriding belief in honor and in fate. In the 5th, 6th, 7th, 8th, 9th, and 10th centuries Christianity gradually spread across Europe, replacing the old myths with the gospel of a universal Creator, father of all men, who once appeared on earth as the man Jesus Christ, worship of whom brings freedom from bondage to all earthly ties, freedom from fate, freedom from death itself. Moreover, Christianity taught that all believers form a community, a Church, which transcends kindred, tribe, and territory. The king continued to be exalted as the supreme religious leader of his people—"Christ's deputy," as he was called in one Anglo-Saxon legal document; nevertheless, Christianity treated even a king as a human being, subject like every other human being to punishment by God for his sins and only able to be saved by God's grace.

These new beliefs had a great appeal to Germanic man. They brought, for the first time, a positive meaning to life and to death, a larger purpose into which to fit the tragedies and mysteries of his existence. Beside these new beliefs the old pagan myths seemed poor and bleak. But by the same token, one might also suppose that the new beliefs would have wholly undermined the social institutions of the old order. On the other hand, one might also wonder how, if Christianity constituted so fundamental a threat to Germanic social institutions, it could have succeeded in making converts among Germanic tribal chiefs and kings. For it was primarily those chiefs and kings who determined the religion of their respective peoples.

To understand the implications of Christianity for Germanic law, one must recall that Germanic Christianity was much closer to Eastern Orthodoxy than



to modern Western Christianity, whether Roman Catholic or Protestant. It was hardly concerned with the reform of social institutions. It was above all concerned with the life of the world to come, and with preparation for that life through prayer and through personal humility and obedience. The highest ideals of Christianity in the first thousand years of Church history, both in the East and in the West, were symbolized above all in the lives of holy men and women living in various forms of monastic communities, with their emphasis on fellowship, on charity, and on withdrawal from the temporal world.

This is not to say that Christianity had no effect whatever on Germanic legal institutions. It affected them in the first instance by influencing kings from time to time to write down the folklaw in the form of short collections of rules. This helped to prevent blood-feud and to keep the peace. The Germanic "codes" also show the gradual effect of some Christian concepts, such as that of the fundamental equality of all persons before God. Thus one may observe some amelioration of the position of women, slaves, and children and some protection of the poor and helpless. Yet on the whole the Church did not challenge the basic features of the barbarian law.

Both the strength and the weakness of Christianity in the centuries in which it first came to prevail among the peoples of Europe lay in its willingness to be integrated with the whole social, political, and economic life of those peoples. The Church as an organization did not stand opposite the political order but within it. Religion was united with politics and economics and law, as they were united with each other. The Church taught sanctity and produced saints; this was something new for the Germanic peoples, who previously had glorified only heroes. But the Church did not oppose heroism and heroes; it only held up an alternative ideal. Similarly, the Church did not oppose blood-feud and ordeals; it only said they could not bring salvation, which came from faith and good works. The majority of bishops and priests of the Church became, in fact, wholly involved in the corruption and violence that characterized the age; this was inevitable, because they were generally appointed by leading politicians from among their friends and relatives. Christianity was Germanized at the same time that the Germanic peoples were Christianized.<sup>19</sup> Thus Christianity had the effect, prior to the 11th and 12th centuries, of devaluing Germanic legal institutions without replacing them by new ones. It left village and tribal feudal law intact. It accepted the fundamental Germanic values of blood and earth, only attempting—with

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19. Cf. BOEHMER, *Das Germanische Christentum*, in 86 THEOLOGISCHE STUDIEN UND KRITIKEN 165 (1913).

occasional successes—to subordinate them to Christian values of salvation by faith and works.

It was not primarily the bishops and priests but the monastic movement which, by its example more than its doctrine, taught Christian ideals of sacrifice and service and love of neighbor (and, at the same time, scientific agriculture) to the Germanic peoples. But the monasteries offered no program of law reform to the world outside.

The monasteries did create miniature legal orders within. Each of the monastic communities had its own law, its own "rule" of work and prayer and of administration and discipline. In the 6th century and thereafter, they adopted "penitentials", consisting of collections of rules assigning punishments for various sins. The earliest ones defined the number of strokes or blows to be imposed on a monk for various forms of misconduct. Eventually, more subtle penalties of repentance, good works, compensation, and pilgrimage were added. Thus Christianity, without denouncing the old communal methods of dispute resolution and punishment, offered its own procedures and its own standards of reconciliation and penance, which were more concerned with the cure of souls than the appeasement of vengeance.

Finally, it is important to note that in the 10th and early 11th centuries, one monastic order, Cluny in southern France, established the first system of administration in which many individual monasteries were united under a single head, the abbot of Cluny. Within a century after it was founded in 910, Cluny numbered about 1450 monasteries. It was Cluny which paved the way for the Papal Revolution by its program of moral reform of Church life and its attack on the buying and selling of Church offices and the involvement of bishops and priests in local, clan, and feudal politics. And it was Cluny, the first translocal corporation,<sup>20</sup> which served as a model for Pope Gregory VII in his reorganization of the Roman Church as a whole.

These, then, were the religious foundations of the Western legal tradition which was initiated by the Papal Revolution of the late 11th and 12th centuries: a Church which for some centuries had been wholly integrated in the social, economic, and political life of the community, except to the extent that monks, whether alone or in monasteries, represented a different world and a religious faith which for centuries had not challenged existing political and legal institutions, but which had served to soften their harsh effects. If we are to look for a modern parallel it is in Eastern Orthodoxy; I think especially of the Russian Orthodox Church which has agreed even to support an atheist

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20. See E. ROSENSTOCK-HUESSY, *THE DRIVING POWER OF WESTERN CIVILIZATION: THE CHRISTIAN REVOLUTION OF THE MIDDLE AGES* 54 (1949).

state in return for the sole right to keep the churches open so that the Russian people may experience in the worship service the presence of God.

### III. THE CRISIS OF THE WESTERN LEGAL TRADITION

The crisis of the Western legal tradition—its impotence to resolve the crucial conflicts of the 20th century and to maintain order and justice in a world mortally imperiled by violence and oppression—is primarily due, I am convinced, to the breakdown of the communities on which the Western legal tradition is founded. The establishment, in the late 11th and 12th centuries, of the Western Church as a visible, corporate, legal entity, standing opposite the secular authorities, and the articulation of autonomous bodies of ecclesiastical and secular law to maintain the cohesion of the Church and of the State and the equilibrium between the two, made sense—and still makes sense—as a way of protecting spiritual values against corrupting social, economic, and political forces in essentially stable Christian communities. These communities, the *populus Christianus*, constituted the true religious foundations of Western law. Where, however, as in America today, and increasingly throughout the West, social life is characterized by religious apathy and by fundamental divisions of race, of class, of the sexes, and of the generations, where bonds of faith are weak and bonds of kinship and of soil have given way to a vague and abstract nationalism, it is useless to suppose that law can effectuate its ultimate purposes. Unless it is rooted in community, law becomes merely mechanical and bureaucratic.

The disintegration of the religious foundations of Western law renders wholly barren the dualism of the secular and spiritual aspects of life. Today, law is something which is taught in law schools, practised in law offices, tested and applied in law courts, made in legislatures. Today religion is something which is taught in schools of theology, practiced in churches, tested and applied by the clergy, made by holy synods, or else, as in some Protestant traditions, religion is something which resides in the heart and conscience of the individual believer. Religion is irrelevant in the law schools, and law is alien to the religious mind. Law becomes just a mechanism, religion just an escape. This is the end of the 900-year-old era of Western law; dualism, or rather pluralism, becomes simply fragmentation and disunity.

It would be presumptuous to attempt, in a few words, to project a way out of this impasse.<sup>21</sup> I will only present two general thoughts:

First, the solution will not be found in a return to simpler things. There is no going back. Second, the Western legal tradition must adapt itself to the

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21. For some suggestions, however, see H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 107-31 (1974).

new age that is emerging out of the confrontation of East and West. These are not primarily geographical terms but temporal terms. For Christianity, East is the first thousand years on which the second is founded. The third era must build on the first two.

I close by paying tribute to Pope John, in whose name this article is written. He faced squarely the real predicament of the Church in the 20th century—not the Church as the clergy but the Church as the people, the *populus Christianus*. He said that “the sons of the Church . . . should make themselves part of the institutions of civil society, and have an impact on them from within.”<sup>22</sup> He opened the doors to the winds of change and to the spirit of renewal. He sought solutions from both the East and the West. He was a man of the next thousand years of the history of mankind.

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22. Encyclical Letter, *Pacem in Terris*, 55 A.A.S. 296 (1963), in THE SIXTEEN DOCUMENTS OF VATICAN II AND THE INSTRUCTION ON THE LITURGY WITH COMMENTARIES BY THE COUNCIL FATHERS 749 (N.C.W.C. transl. 1963).